No. 84-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,

Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF OF *AMICI CURIAE* PACIFIC BELL, *ET AL.* IN SUPPORT OF APPELLANT

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QUESTION PRESENTED

Does an order of a state public utilities commission violate the First Amendment of the Constitution of the United States by compelling a privately-owned public utility to include in its monthly billing envelope the messages of a third party?

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INTEREST OF THE *AMICI CURIAE*, PACIFIC BELL, *ET AL.*

Pacific Bell is a privately-owned public utility company providing telecommunications services to a majority of the people of the State of California. The telecommunications services it provides and the rates it charges therefor in California are subject to the regulation of the appellee, the Public Utilities Commission of the State of California ("CPUC" or "Commission"), except insofar as that authority is preempted by the Federal Communications Commission.

As was the case with Pacific Gas & Electric Co. ("PGandE"), complaints have been filed with the Commission seeking to compel Pacific Bell to make available to third parties the use of Pacific Bell's mailings to its customers for the third parties' communications, both additional to and supplanting Pacific Bell's communications. The Pacific Bell cases before the Commission have long since been fully briefed and argued, but no opinion or order has issued from that agency. Obviously, any disposition of this case on its merits will seriously affect the Commission's judgment in the Pacific Bell cases, although there are constitutional questions raised by Pacific Bell other than the

one proferred here by PGandE. As *amici*, we confine ourselves here to the question presented by the appellant, whether the action of the Commission violates the commands of the Speech and Press Clauses of the First Amendment.

General Telephone Company of California, Southern California Edison Company and Southern California Gas Company, also *amici curiae* here, are the three largest public utility companies in the State of California, with the exceptions of PGandE and Pacific Bell. None of these three utility companies has yet been ordered by the CPUC to allow third parties to use the utilities' mailings for their own communications. These utilities are regulated by the CPUC and would be subject to any rule validated by this Court, and the outcome of these proceedings will have a significant effect upon their operations.

We have received the written permission of the parties to this case to file this brief *amici* and these have been filed in the office of the Clerk.

ARGUMENT

I. WHAT THIS CASE IS NOT ABOUT.

It is appropriate at the outset to clear the atmosphere of certain of appellees' suggestions that tend to becloud the questions in issue here.

First. This case does not present a question whether the CPUC can preempt for its own use the mailing envelopes of PGandE or compel PGandE to deliver the CPUC's messages to PGandE customers. The issue here is rather whether the CPUC can commandeer the utility's usual medium for communication with its customers, its mailings, for third parties to solicit funds for their own use and to disseminate their "literature". The voluntary associations which are appellees, however self-righteous, have no cloak of governmental office and are in no ways surrogates of the CPUC. Nor does anything in California law warrant a delegation of CPUC authority to them.

Second. There is no question here, either, whether the CPUC can require PGandE stockholders, rather than the ratepayers, to pay a part of the mailing costs for those envelopes in which PGandE places its communications along with its bills. One thing certain, however, is that the PGandE customers do not pay any more for PGandE mailings which contain communications from PGandE along with bills than they would pay if the mailings consisted of bills alone, since there is a minimum first-class postage charge for all such mail weighing up to one ounce, and the PGandE bills have been sent in mail weighing not more than one ounce.

Third. There is no question raised here whether the CPUC could authorize or compel PGandE to make available a mailing list of its customers to designated third parties and, if so, at what charge. (Parenthetically, it is noted that the names and addresses of a great majority of Pacific Bell's and General Telephone's customers are published in telephone directories.)

The sole questions before this Court are whether the CPUC can compel PGandE to act as publisher of the messages of third parties—and whether the CPUC can inhibit PGandE from publishing its own messages—by requiring it to include the messages of third parties in its billing envelopes.

II. PGandE'S COMMUNICATIONS TO ITS CUSTOMERS BY WAY OF INSERTS IN ITS BILLING ENVELOPES ARE SPEECH PROTECTED AGAINST REGULATION BY THE STATE BY REASON OF THE FREE SPEECH PROVISION OF THE FIRST AMENDMENT.

That the use of its billing envelopes by a public utility to communicate messages to its customers is an exercise of protected speech is clearly established by this Court's decision in *Consolidated Edison Co.* v. *Public Service Comm'n,* 447 U.S. 530 (1980). Whether the communication from a utility takes the form of a "bill insert" or newspaper advertising, whether the subject matter of the communication relates to the business of the utility with its consumers or to a matter of "public controversy," this Court has held these communications to be protected forms of expression under the free speech provisions of the First Amendment. *Ibid.; Central Hudson Gas & Elec.* v. *Public Service Comm'n,* 447 U.S. 557 (1980).

It is doubtful that the speech in question here belongs in the less protected category of "commercial" speech. *See, e.g.,* concurring opinions in *Central Hudson,* 457 U.S. at 572, 573, 579. While we do not know what the content of the communications will be, it will not necessarily fall into the category of offering or advertising goods or services for sale. As the record indicates, the challenged order requires that "PG&E shall give TURN access to the extra space in the billing envelopes four times a year for the next two years. PG&E shall be permitted to use the extra space during the remaining months." App. A-32.

"PG&E and TURN shall each determine the content of its material." *Ibid.* Whether "pure" speech or "commercial" speech, however, the result commanded by the Constitution must be the same. If "pure" speech, it is patently beyond this form of censorship by the CPUC; if "commercial" speech, the CPUC has failed to establish the necessity for its censorship, which it has the burden to prove.

III. IF THE "EXTRA SPACE" IN PGandE'S BILLING ENVELOPES IS "PROPERTY", IT IS PGandE'S PROPERTY; THE "EXTRA SPACE" IS NOT SUBJECT TO CONTROL OF THE CPUC; AND IT DOES NOT CONSTITUTE A PUBLIC FORUM.

The decision of the Commission is predicated on erroneous premises: first, that the space in the envelopes in which PGandE mails its bills to its customers is property which does not belong to PGandE; second, that the CPUC has authority to determine the use of the billing envelopes; and third, that the space in the envelopes in which PGandE mails its bills to its customers constitutes a public forum. These premises are all in error. Even if PGandE were a government corporation, the space in the envelopes would not constitute a public forum.

The essence of a public utility is not that it or its property is owned by the public but that it provides products or services which must be made available without discrimination to all who would purchase them. To assure these results, services offered by the utility to the public are subject to the terms, conditions, and rates fixed according to due process by the state regulatory agency.

It seems never to have occurred to anyone prior to the decision in *Consolidated Edison* to suggest that anyone other than the sender "owned" the space in a first-class mailing envelope. The *ad hoc* creation of a property interest somewhere else is an imaginative but unprecedented conception. It had never been suggested that the many utilities throughout the country which have included circulars with their bills have been

chargeable with trespass d.b.a. for the use of property that was not theirs or that they were guilty of conversion. Indeed, the idea that there might be "property rights" to the inside of first-class mailing envelopes has not been a subject of much judicial consideration otherwise than to acknowledge the mandate of the Constitution that government keep its hands off and its nose out of the contents of the mails. Cf., e.g., Bolger v. Young's Drug Products Corp., 463 U.S. 60, (1983); Blount v. Rizzi, 400 U.S. 410 (1971); Lamont v. Postmaster General, 381 U.S. 301 (1965).

There is a very good reason why the "extra space" or any space in a mailing envelope has not been treated as "property" subject to regulation by a state. The use of the mails is not a state-created right at all. What may or may not be put into the mails and who shall have the privilege of using them is a subject totally within the ken of the federal legislature, limited of course by the mandates of the First Amendment. The Supremacy Clause precludes state regulation of the mails because that power is vested exclusively in the federal legislature. See Milwaukee Pub. Co. v. Burleson, 255 U.S. 407 (1921), and especially Mr. Justice Brandeis's dissenting opinion, id. at 417, and Mr. Justice Holmes's dissenting opinion, id. at 436. To the extent that the use of the first class mails is a privilege or a right, it is a federally-created privilege or right not subject to control by state authority.

If the right to use the mails were to be treated as "property" regulable by the states, it would be private property that could not be commandeered by a State or its agencies except pursuant to the terms of the Fifth Amendment (as applicable to the States through the Fourteenth Amendment), which provides in part: "nor shall private property be taken for public use, without just compensation." Thus, for example, if PGandE were to own an office building in which it housed its business operations, the Commission could not order it to turn over office space within that building for the use of such persons

as the Commission might designate, however essential the office space might be to the supplying of utility services. It is simply not within a state regulatory commission's jurisdiction to direct a utility to devote its property to, or to enter, a private venture such as mailing services. It is the utility-supplying function that the CPUC is authorized to regulate, not the property that is owned by the private corporation.

If PGandE's first-class mail envelopes were somehow considered to be a public forum, the CPUC would be required to license their use on the same terms to any or all who made application for them, on a nondiscriminatory basis and without regard to the subject matter to be covered. If TURN, then also the Church of Scientology; if TURN, then also a candidate for public office; if TURN, then also every competing producer of energy: oil, coal, wood, solar heat, windmills, waterpower. Admittedly, this is an argument ad absurdum. Like the notion that the inside of the envelope is the property of someone other than the mailer, the notion that a first-class mail envelope is a public forum is, if not absurd, certainly novel and abstruse, since such an envelope cannot reasonably be said to be either "public" or a "forum" as the English language is ordinarily used.

Even if PGandE were a government instrumentality, which it is not, that would not create a right of access to its mail by anyone seeking to propagandize or proselytize. The concept of a physical area as a public forum for speech and debate has its origin with public property. It derives from Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939), where Justice Roberts described the concept in this way:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the

> privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order, but it must not, in the guise of regulation, be abridged or denied. Id. at 515-16.

The concept of making public areas available for those who wish to use them for purposes of communication has been expanded by this Court to some privately-owned premises which have been opened and committed to public use by the private owners. See, e.g., Marsh v. Alabama, 326 U.S. 501 (1946); Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968), which was qualified or overruled in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Prune Yard Shopping Center v. Robins, 447 U.S. 74 (1980). (The last of these cases has been read by Professor Archibald Cox not as an expansion of speech rights but rather as one "accommodating the law of trespass to modern conditions." See Cox, The Supreme Court, 1979 Term: Foreword: Freedom of Expression in the Burger Court, 94 Harv. L. Rev. 1, 48 (1980).)

The mere fact of public ownership, even of a medium of communication, does not create the right to its use or the determination of its use by other than its proprietors. "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government." United States Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114, 129 (1981). Clearly neither the United States Reports nor the Congressional Record need be opened to the expression of views other than those of the Justices in the one case and Congress in the other, although both are publicly owned and certainly arouse a diversity of views among citizen readers and critics. Cf. Lehman v. City of Shaker Heights, 418

U.S. 298 (1974); Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37 (1983); Alvins v. Rutgers, State University of New Jersey, 385 F.2d 151 (3d Cir. 1967), cert. denied, 390 U.S. 920 (1968). First-class mail "is not by tradition or designation a forum for public communication." Perry Educ. Ass'n, supra, 460 U.S. at 46; United States Postal Service, supra, 453 U.S. at 131, n.7.

There is no evidence in the jurisprudence of this Court that a State is free to make a public forum for speech out of property that a private owner has never opened to the public for its use. Reliance on Prune Yard for that proposition is misplaced. This Court made it clear that the result there was predicated on the fact that the shopping center parking area in question was not reserved for the private use of the owner. 447 U.S. at 87. This had two implications: first, that the speaker was there by the owner's implied invitation; and second, that not all activities conducted in the space would be deemed to have the sanction of the property owner. Certainly there has been no invitation from PGandE to make use of its mail, nor can there be much doubt that the views expressed in the mailings carry the implied imprimatur of PGandE.

Moreover, to make PGandE publish under its aegis views that are not its own is plainly a violation of the commands of the First Amendment. The First Amendment protects not only the freedom to speak, but the freedom not to speak. Wooley v. Maynard, 430 U.S. 705 (1977); Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974); cf. Midwest Video Corp. v. FCC, 440 U.S. 689 (1979). It protects the freedom to associate, and the freedom not to associate. Abood v. Detroit Board of Education, 431 U.S. 209 (1977); Elrod v. Burns, 427 U.S. 347 (1976). As this Court said in Wooley, supra, "The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind." Wooley, supra, 430 U.S. at 714.

There are two other important distinctions. Prune Yard's speaker was not selected by the State; consequently, there was

no danger of governmental discrimination for or against a particular message. Here there is. And in *Prune Yard*, the Court found that the speaker's use of the shopping center did not substantially interfere with the owner's use of it. Here it does.

It was, and presumably remains, this Court's position that a "state in the exercise of its police power may adopt reasonable restrictions on property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provisions." 447 U.S. at 81. Here not only would there be a taking of PGandE's property without compensation, there is a clear infringement of PGandE's First Amendment rights as well.

IV. THERE IS NO OVERRIDING STATE INTEREST TO JUSTIFY THE COMMISSION'S TRANSGRESSION OF PGandE'S FIRST AMENDMENT RIGHTS.

If what is at issue is commercial speech, it is nevertheless well-established by this Court that censorship of that speech by government requires justification by way of an overriding interest of state. That is the clear lesson of Consolidated Edison and Central Gas and Electric, inter alia. The Commission has certainly not carried its burden of persuasion on that point here. The only justification offered by the Commission for its order that both inhibits PGandE from expressing its views and compels it to express the views of third parties is that the Commission wants a plurality of voices to be heard by PGandE customers. It has, however, long since been made clear by this Court that such a rationalization is itself inconsistent with the First Amendment. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). "[T]he implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this

at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254 (1974). The argument of the Commission thus reduces itself to the proposition that the invasion of PGandE's First Amendment rights is justified by what this Court says the First Amendment forbids.

The contents of PGandE mailing envelopes clearly do not make them subject to prescription or proscription, even by the government of the United States which itself provides the mail services, *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), no less by a state public utilities commission, *Consolidated Edison Co. v. Public Service Comm'n*, supra. Since the Commission's avowed objective is to publicize the views of self-appointed consumer advocates under the aegis of a PGandE communication, it fails to meet the first requirement of *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, supra, that the restraint directly advance a legitimate and substantial state interest. The restraint, at best, only indirectly advances a state interest. *Id.* at 564. Nor did the Commission show the necessity for this remedy as the most effective and least burdensome method for reaching its goal, as Central Hudson demands. *Ibid.* PGandE's mail is clearly not the only way for the intervenors to reach PGandE customers with whatever messages they may have for them. The U.S. mail, print, and electronic media are open to them as well as to anyone else. Their powers of communication can be fully preserved without limiting those of PGandE in violation of the First Amendment as the CPUC has done here.

CONCLUSION

Amici curiae, Pacific Bell, et al., respectfully submit that, for the reasons heretofore stated, this Court should reverse the judgment below.

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